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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TIBCO SOFTWARE INC.,

Plaintiff,

vs.

BANK OF AMERICA CORPORATION;
BANK OF AMERICA, NATIONAL
ASSOCIATION; MERRILL LYNCH,
PIERCE, FENNER & SMITH, INC.

Defendants.

CASE NO. 5:14-cv-02782

**COMPLAINT FOR COPYRIGHT
INFRINGEMENT, BREACH OF
CONTRACT, AND SPECIFIC
PERFORMANCE**

DEMAND FOR JURY TRIAL

Plaintiff TIBCO Software Inc. (“TIBCO”) for its complaint against defendants Bank of America Corporation; Bank of America, National Association; Merrill, Lynch, Pierce, Fenner & Smith, Inc. (collectively “Global Bank Defendants”) hereby alleges:

PARTIES

1. Plaintiff TIBCO is a Delaware corporation, with its principal place of business at 3303 Hillview Avenue, Palo Alto, California 94304-1213.

2. Upon information and belief, Defendant Bank of America Corporation (“BAC”) is a Delaware corporation principally located in Charlotte, North Carolina, with offices and substantial business operations within this judicial district.

1 administered out of and in the San Jose Division of this District, consistent with Local Rule 3-
2 2(h).

3 **BACKGROUND FACTS**

4 10. TIBCO is a global leader in infrastructure and business intelligence software.
5 TIBCO's software provides customers with solutions for integration challenges in the cloud, on-
6 premise, or when building a hybrid architecture. As part of its business, TIBCO licenses others to
7 use TIBCO's software for their respective integration needs.

8 11. TIBCO has assisted BANA by licensing solutions for its software integration needs
9 for more than 10 years. Similarly, TIBCO has also had a longstanding relationship with MLPF&S
10 that pre-dated its acquisition by BAC, by virtue of BAC's acquisition of Merrill Lynch & Co.,
11 which continues through today. TIBCO has licensed software to support the Global Bank
12 Defendants' businesses and business lines.

13 12. On or about May 28, 2004, TIBCO and BANA, on behalf of itself and its
14 Affiliates, entered into a written Master Software License and Maintenance Agreement. The
15 agreement was later renamed as the Master Software License, Customization and Services
16 Agreement (hereinafter "Master Agreement"¹). On or about October 30, 2009, TIBCO and
17 BANA, on behalf of itself and its Affiliates, executed a written Second Addendum to the Master
18 Agreement (hereinafter "Second Addendum"), that *inter alia*, terminated Merrill Lynch & Co. and
19 MLPF&S's pre-acquisition agreements and made them subject to the Master Agreement.

20 13. On or about February 27, 2010, TIBCO and BANA, on behalf of itself and its
21 Affiliates, executed a written Third Addendum to the Master Agreement (hereinafter "Third
22 Addendum"). Subject to specified restrictions, TIBCO granted the Global Bank Defendants in the
23 Third Addendum a license to deploy various software products ("TIBCO Software") for a three
24 year period (hereinafter the "Enterprise Term"). The Global Bank Defendants were further
25 entitled, for a fee, to certain maintenance of the TIBCO Software.

26
27 ¹ The Master Agreement and its addenda described herein will be collectively referred to as
28 the "Master Agreement" unless otherwise noted.

1 14. The license granted by TIBCO to the Global Bank Defendants contained specific
2 restrictions concerning the deployment and creation of copies of the TIBCO Software. The
3 specific terms of the Master Agreement are governed by a confidentiality provision.

4 15. At least between February 27, 2010 and February 26, 2013, the Global Bank
5 Defendants accessed TIBCO's download portal and downloaded copies of TIBCO Software,
6 including but not limited to the following products:

- 7 • TIBCO Hawk
- 8 • TIBCO Hawk Workstation
- 9 • TIBCO Adapter for Siebel
- 10 • TIBCO BusinessEvents Enterprise Edition
- 11 • TIBCO ActiveMatrix Adapter for SAP
- 12 • TIBCO ActiveSpaces Enterprise Edition
- 13 • TIBCO Rendezvous
- 14 • TIBCO Enterprise Message Service
- 15 • TIBCO ActiveMatrix Adapter for PeopleSoft
- 16 • TIBCO Adapter for SWIFT
- 17 • TIBCO ActiveMatrix Service Bus
- 18 • TIBCO ActiveMatrix Service Grid
- 19 • TIBCO ActiveMatrix Adapter for Database
- 20 • TIBCO ActiveMatrix Adapter for Files (Unix/Win)
- 21 • TIBCO ActiveMatrix Adapter for WebSphere MQ
- 22 • TIBCO Adapter for LDAP
- 23 • TIBCO Adapter for Oracle Applications
- 24 • TIBCO Syndera Operation Suite
- 25 • TIBCO BusinessWorks COBOL Copybook Plug-in (which was renamed
26 TIBCO ActiveMatrix BusinessWorks Plug-in for Data Conversion prior to
27 February 26, 2013)

1 (collectively the “TIBCO Registered Software”). TIBCO has registrations or has filed copyright
2 applications and related deposits for the TIBCO Registered Software.

3 16. The Enterprise Term expired on February 26, 2013.

4 **A. Merrill Lynch One Integration Project**

5 17. Approximately six months after the Enterprise Term expired, TIBCO learned that
6 the Global Bank Defendants began rolling out a large integration initiative called Merrill Lynch
7 One. Upon information and belief, Merrill Lynch One was designed to transform how advisors
8 deliver advice, while providing the MLPF&S’s clients and advisors access to Merrill Lynch’s
9 Investment advisory program through a single set of workflows, fees, paperwork, and
10 communications.

11 18. Upon information and belief, TIBCO understands that the initial roll out of the
12 Merrill Lynch One project began in September 2013—more than 6 months after the expiration of
13 the Enterprise Term—to an initial group of 400 MLPF&S advisors, and an additional 14,000
14 advisors will migrate to the Merrill Lynch One platform this year.

15 19. Upon information and belief, the Global Bank Defendants make use of copies of
16 certain TIBCO Software, including TIBCO Registered Software, for the Merrill Lynch One
17 project.

18 20. Upon information and belief, the Global Bank Defendants do not have licensed
19 copies of the TIBCO Registered Software, and have instead made unauthorized copies and used
20 the same for the Merrill Lynch One Project.

21 21. The Master Agreement obligated the Global Bank Defendants to provide TIBCO
22 with written notice of the Number of Units deployed in Production and Non-Production use during
23 the term of the license within sixty days after the end of the Enterprise Term (hereinafter the
24 “Deployment Report”). The purpose of this provision is to give TIBCO an accurate snapshot of
25 the authorized number of licensed copies of TIBCO Software the Global Bank Defendants had
26 under the Master Agreement.

27 22. Although the Global Bank Defendants were obligated to provide TIBCO with the
28 Deployment Report no later than April 26, 2014, the Global Bank Defendants provided TIBCO

1 with the Deployment Report on October 15, 2013, almost 6 months late. The Deployment Report
2 was provided to TIBCO only after the initial Merrill Lynch One roll out in September 2013.

3 23. Upon information and belief, the Deployment Report showed that the Global Bank
4 Defendants misstated (and, in fact, overstated) the number of licensed copies of TIBCO Software,
5 including TIBCO Registered Software, in existence at the end of the Enterprise Term. Upon
6 information and belief, the Global Bank Defendants did this, among other reasons, so that they
7 could claim the right to use TIBCO Software copies, including TIBCO Registered Software
8 copies, they did not otherwise have the authorized right to make or use at the end of the Enterprise
9 Term for, including but not limited to, its Merrill Lynch One integration initiative and concurrent
10 user migration.

11 24. Thus, upon information and belief, the Global Bank Defendants have made and
12 used unauthorized copies of the TIBCO Software, including TIBCO Registered Software, both
13 before and after the Enterprise Term, as part of the Merrill Lynch One integration initiative and
14 concurrent user migration.

15 **B. The Global Bank Defendants' Stockpiling of Software**

16 25. Upon information and belief, the Global Bank Defendants have declared in their
17 Deployment Report Production and Non-Production licenses for TIBCO Software, including
18 TIBCO Registered Software, that resides on their Production and Non-Production servers.

19 26. Upon information and belief, the Global Bank Defendants have wrongly and
20 misleadingly declared that numerous copies of the TIBCO Software residing on their servers are
21 for either "Production" or "Non-Production" use for the purpose of wrongly and without
22 authorization from TIBCO stockpiling copies of TIBCO Software, including TIBCO Registered
23 Software, for future projects and future use, in violation of the express terms of the Master
24 Agreement.

25 27. Moreover, TIBCO is informed and believes, and upon such information and belief
26 alleges that a specific group of the Global Bank Defendants' servers contain copies of TIBCO
27 Software, including TIBCO Registered Software, that have not been used for Production or Non-
28 Production purposes either during the Enterprise Term or after, and that all such copies are

1 therefore unauthorized. As a result, the Global Bank Defendants have made and used unlicensed
2 copies of TIBCO Software, including TIBCO Registered Software, that were never in Production
3 or Non-Production use to support the Global Bank Defendants' business, which exceed the scope
4 of the license grant and violates TIBCO's exclusive copyrights in the TIBCO Registered Software.

5 28. Finally, the Global Bank Defendants have made hardware upgrades to their servers
6 that increased processing capabilities for TIBCO Software, including TIBCO Registered Software,
7 in Production and Non-Production usage, thereby also making unauthorized copies of the TIBCO
8 Software in contravention of the Master Agreement with TIBCO and in violation of United States
9 copyright laws.

10 **C. The Global Bank Defendants' Software Bundle Deployment Strategy**

11 29. Solely for convenience and expediency, the Global Bank Defendants deployed
12 numerous unauthorized images (or copies) of bundled TIBCO Software, that included TIBCO
13 Registered Software, during the Enterprise Term that were not used to support the business of the
14 Global Bank Defendants and that otherwise represented unauthorized copies of the TIBCO
15 Software (hereinafter the "TIBCO Idle Software").

16 30. Yet, upon information and belief, the Global Bank Defendants have claimed and
17 misappropriated for themselves unauthorized Production copies and licenses to the TIBCO Idle
18 Software. The only permissible copies and licenses of TIBCO Software under the Master
19 Agreement were for Production or Non-Production use (or Development, which is not applicable
20 here). Upon information and belief, Global Bank Defendants made unauthorized copies for other
21 purposes, including TIBCO Registered Software copy stockpiling, which is neither Production nor
22 Non-Production.

23 31. Upon information and belief, the Global Bank Defendants continue to make and
24 use unauthorized and unlicensed TIBCO Idle Software copies.

25 **D. The Global Bank Defendants' Additional Unlicensed Copying After the**
26 **Enterprise Term Expired**

27 32. TIBCO is informed and believes, and upon such information and belief alleges that
28 the Global Bank Defendants continue to introduce new software applications that interoperate with

1 the TIBCO Registered Software, and thereby have made unauthorized copies of TIBCO
2 Registered Software, after the Enterprise Term.

3 33. The Global Bank Defendants do not have Production (or any other) licenses for
4 these copies of TIBCO Registered Software.

5 **E. Additional Deployment Report Misstatements Made by the Global Bank**
6 **Defendants**

7 34. Upon information and belief, the Global Bank Defendants have improperly
8 declared Production licenses and copies in their Deployment Report for certain TIBCO Software,
9 including TIBCO Registered Software, that was deployed only as part of a pilot program before
10 the Enterprise Term expired.

11 35. In addition, upon information and belief, the Global Bank Defendants declared
12 Production licenses and copies for all of their potential users of certain TIBCO Software in the
13 Deployment Report even though not all users were using or had a need to use the TIBCO Software
14 at the time the Enterprise Term expired.

15 36. In summary, upon information and belief and knowledge about the state of the
16 Global Bank Defendants' deployments at the end of the Enterprise Term and after, comparing that
17 knowledge with Global Bank Defendants' Deployment Report, and recognizing the Global Bank
18 Defendants' need for TIBCO Software for the Merrill Lynch One project, the Global Bank
19 Defendants: (1) made, and continue to make, unlicensed copies, distributions, displays and/or
20 reproductions of TIBCO Registered Software after the Enterprise Term; (2) made unlicensed
21 copies, distributions, displays and/or reproductions of TIBCO Registered Software during the
22 Enterprise Term where such TIBCO Software was not in Production or Non-Production use; (3)
23 incorrectly reported Production and Non-Production TIBCO Software, including TIBCO
24 Registered Software, licenses and copies in their Deployment Report; and (4) increased processing
25 capabilities for, and therefore unauthorized copies of, TIBCO Software, including TIBCO
26 Registered Software, for Production and Non-Production usage.

27 37. On several occasions between February 2013 and May 2014, TIBCO offered the
28 Global Bank Defendants an opportunity to cure, and even offer a justification for, the unauthorized

1 copying of TIBCO Software and breaches of the Master Agreement previously referenced, but the
2 Global Bank Defendants failed and refused to do so.

3 38. TIBCO is currently unable to ascertain the full extent of the monetary damages it
4 has suffered by reason of the Global Bank Defendants' copyright infringement and related breach
5 of contract, but believes the value of the unauthorized copies the Global Bank Defendants have
6 made and/or claimed exceeds \$300,000,000.

7 39. Pursuant to the terms of the Master Agreement, disputes "relating to infringement
8 of Intellectual Property Rights" are not subject to mediation or arbitration. The copyright
9 infringement, breach of contract, and specific performance claims herein all relate to each other,
10 and, therefore, none of them is arbitrable.

11 **FIRST CLAIM FOR RELIEF**

12 **COPYRIGHT INFRINGEMENT – 17 U.S.C. §§ 101, *et seq.***

13 40. Plaintiff TIBCO incorporates by reference each of the allegations contained in the
14 foregoing Paragraphs 1 through 39.

15 41. In compliance with the Copyright Regulations, TIBCO has registered or filed with
16 the Copyright Office copyright applications, registration fees, and deposits of the works being
17 registered. TIBCO is the owner of all right, title and interest to the registrations and copyright
18 applications for the TIBCO Registered Software.

19 42. The effective date of each application and copyright registration is the day on
20 which the application, deposit and fee were received in the Copyright Office. 17 U.S.C. § 410(d).
21 Therefore, the effective date of the copyright registrations at issue are, among others:

22 Registration / Case No.	Effective Date	TIBCO Registered Software
23 <u>TX0007845818</u>	6/6/2014	TIBCO Hawk 4.0.0 (which is the same code as 24 TIBCO Hawk Workstation)
25 <u>TX0007845817</u>	6/8/2014	TIBCO Adapter for Siebel 5.0.1
26 <u>TX0007848608</u>	6/13/2014	TIBCO BusinessEvents Enterprise Edition 3.0.0
27 <u>1-1489226731</u>	6/8/2014	TIBCO ActiveMatrix Adapter for SAP 6.0.0
<u>1-1489086217</u>	6/8/2014	TIBCO ActiveSpaces Enterprise Edition 1.0.0
28 <u>1-1489086182</u>	6/6/2014	TIBCO Rendezvous 8.0.0

<u>1-1489086147</u>	6/6/2014	TIBCO Enterprise Message Service 5.0.0
<u>1-818386740</u>	6/6/2014	TIBCO ActiveMatrix Adapter for PeopleSoft 6.0.0
<u>1-1489086302</u>	6/10/2014	TIBCO Adapter for SWIFT 5.0.1
<u>1-1489226637</u>	6/10/2014	TIBCO ActiveMatrix Service Grid 2.0.0 (which includes the software for TIBCO ActiveMatrix Service Bus 2.0.0)
<u>1-1504420527</u>	6/13/2014	TIBCO ActiveMatrix Adapter for Database 6.0.0
<u>1-1507004522</u>	6/13/2014	TIBCO ActiveMatrix Adapter for Files (Unix/Win) 6.0.0
<u>1-1507000732</u>	6/13/2014	TIBCO ActiveMatrix Adapter for WebSphere MQ 6.0.0
<u>1-1506760547</u>	6/13/2014	TIBCO Adapter for LDAP 5.0.1
<u>1-1507076937</u>	6/13/2014	TIBCO Adapter for Oracle Applications 5.0.1
<u>1-1506759682</u>	6/13/2014	TIBCO Syndera Operation Suite 3.3.0
<u>1-1509515122</u>	6/16/2014	TIBCO ActiveMatrix BusinessWorks Plug-in for Data Conversion 3.0.0 (which previously was named TIBCO BusinessWorks COBOL Copybook Plug-in)

43. The TIBCO Registered Software is comprised of original works of authorship that are copyrightable subject matter under the copyright laws of the United States, 17 U.S.C. §§ 101 *et seq.* TIBCO has complied in all respects with the laws governing copyright and has secured the exclusive rights and privileges in, to and under the copyrights in the copyrighted TIBCO Registered Software.

44. As the owner of the copyrights in the TIBCO Registered Software, TIBCO enjoys the exclusive right to, among other things, reproduce, made derivative works of, display and distribute the TIBCO Registered Software. 17 U.S.C. §§ 101, 106.

45. Upon information and belief, the Global Bank Defendants have been and are reproducing, distributing, displaying, and using the copyrighted TIBCO Registered Software without authorization from TIBCO.

46. The Global Bank Defendants have infringed the copyrights in the TIBCO Registered Software by, *inter alia*, (1) making, and continuing to make, unlicensed copies, distributions, displays and/or reproductions of TIBCO Registered Software after the Enterprise

1 Term; and (2) making unlicensed copies, distributions, displays and/or reproductions of TIBCO
2 Registered Software during the Enterprise Term where such TIBCO Registered Software was not
3 in Production or Non-Production use.

4 47. At all times relevant hereto, the Global Bank Defendants have been aware or
5 should have been aware of the existence of TIBCO's copyrights in the TIBCO Registered
6 Software and therefore, the Global Bank Defendants are willful infringers of TIBCO's copyrights.

7 48. TIBCO is entitled to recover from the Global Bank Defendants the damages it has
8 sustained as a result of these wrongful acts.

9 49. The infringement of TIBCO's copyrights by the Global Bank Defendants will
10 cause imminent harm to TIBCO's reputation and goodwill unless restrained by this Court. The
11 Global Bank Defendants' infringement will irreparably harm TIBCO's business and deprive it of a
12 competitive advantage. TIBCO has no adequate remedy at law for the Global Bank Defendants'
13 infringement.

14 **SECOND CLAIM FOR RELIEF**

15 **BREACH OF CONTRACT**

16 50. Plaintiff TIBCO incorporates by reference each of the allegations contained in the
17 foregoing Paragraphs 1 through 49.

18 51. From May 29, 2004 through February 26, 2013, the written Master Agreement
19 governed the Global Bank Defendants' right to use the TIBCO Software.

20 52. Under the terms of the written Master Agreement, the Global Bank Defendants
21 were obligated to provide TIBCO with a Deployment Report within sixty days after the end of the
22 Enterprise Term.

23 53. The Deployment Report was provided to TIBCO almost six months late, and did
24 not accurately reflect the Number of Units the Global Bank Defendants deployed in Production
25 and Non-Production during the Enterprise Term.

26 54. In addition, the Global Bank Defendants migrated the TIBCO Software to servers
27 with enhanced core capacity in breach of the Master Agreement.

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1 55. The obligations of the Global Bank Defendants under the terms of the Master
2 Agreement were in effect at all relevant times.

3 56. TIBCO performed all conditions, covenants and promises under the Master
4 Agreement.

5 57. By at least making unauthorized copies of the TIBCO Software both during and
6 after the Enterprise Term, providing an inaccurate and late Deployment Report, improperly
7 declaring Production and Non-Production licenses, and by migrating TIBCO Software to servers
8 with enhanced core capacity, the Global Bank Defendants breached the terms of the Master
9 Agreement.

10 58. TIBCO is entitled to recover from the Global Bank Defendants the damages it has
11 sustained as a result of these wrongful acts.

12 59. TIBCO has been and is continually and irreparably damaged as a result of the
13 Global Bank Defendants' breaches of the Master Agreement, and has no adequate remedy at law.
14 The Global Bank Defendants' unlawful conduct will continue to damage TIBCO unless enjoined
15 by this Court.

16 60. The Global Bank Defendants' conduct as alleged herein warrants termination of the
17 Master Agreement, and TIBCO reserves its right to amend its complaint to seek all remedies it is
18 entitled to following such termination, as well as for the Global Bank Defendants' past breaches.

19 **THIRD CLAIM FOR RELIEF**

20 **SPECIFIC PERFORMANCE**

21 61. Plaintiff TIBCO incorporates by reference each of the allegations contained in the
22 foregoing Paragraphs 1 through 60.

23 62. TIBCO and the Global Bank Defendants entered into a written Master Agreement
24 that governed the Global Bank Defendants' right to use the TIBCO Software that is sufficiently
25 definite and certain in its terms to be enforced.

26 63. The consideration was adequate and the Master Agreement was just and reasonable
27 as to the Global Bank Defendants.

1 64. TIBCO performed all conditions, covenants and promises under the written Master
2 Agreement.

3 65. By at least making unauthorized copies of the TIBCO Software both during and
4 after the Enterprise Term, providing an inaccurate and late Deployment Report, improperly
5 declaring Production and Non-Production licenses, and by migrating TIBCO Software to servers
6 with enhanced core capacity, the Global Bank Defendants breached the terms of the Master
7 Agreement.

8 66. TIBCO has been and is continually and irreparably damaged as a result of the
9 Global Bank Defendants' breaches, and has no adequate remedy at law. The Global Bank
10 Defendants' unlawful conduct will continue to damage TIBCO unless enjoined by this Court.

11 67. The Global Bank Defendants cannot rely upon the statute of frauds as an
12 affirmative defense in this action.

13 **PRAYER FOR RELIEF**

14 WHEREFORE, Plaintiff prays for judgment to be entered against the Global Bank
15 Defendants as follows:

16 A. Declare that the Global Bank Defendants have infringed TIBCO's copyrighted
17 TIBCO Registered Software.

18 B. Pursuant to 17 U.S.C. § 502, temporarily, preliminary, and permanently enjoin the
19 Global Bank Defendants, their officers, agents, servants, employees and attorneys, and all persons
20 in active concert or participation with them, from infringing the copyrighted TIBCO Registered
21 Software in any manner, and from reproducing and preparing derivative works from the
22 copyrighted TIBCO Registered Software.

23 C. Pursuant to 17 U.S.C. § 503, order the impounding of all unlicensed copies,
24 including all executing and archival copies, of the copyrighted TIBCO Registered Software.

25 D. Pursuant to 17 U.S.C. § 504, order an accounting of all gains, profits and
26 advantages derived by the Global Bank Defendants from their copyright infringement, and order
27 the Global Bank Defendants to pay to TIBCO the actual damages that TIBCO has sustained and
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1 the Global Bank Defendants' profits attributable to their copyright infringement, including treble
2 damages for willful infringement.

3 E. Enter judgment against the Global Bank Defendants in an amount equal to
4 TIBCO's actual damages as determined by the Court.

5 F. Declare that the Global Bank Defendants breached the Master Agreement.

6 G. Enter judgment in TIBCO's favor and against the Global Bank Defendants for
7 breach of the Master Agreement, in an amount to be determined, plus any interest allowed by law.

8 H. Order the Global Bank Defendants to specifically perform the covenants agreed to
9 in the Master Agreement.

10 I. Grant such other and further relief as the Court may deem just and proper.

11
12 DATED: June 16, 2014

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

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15 By /s/Claude M. Stern
16 Claude M. Stern
17 Attorneys for Plaintiff TIBCO SOFTWARE INC.
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DEMAND FOR JURY TRIAL

Plaintiff TIBCO Software Inc. demands a jury trial in this action.

DATED: June 16, 2014

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

By /s/Claude M. Stern
Claude M. Stern
Attorneys for Plaintiff TIBCO SOFTWARE INC.